

Pro Se

Vol. 36 No. 3 May 2026

Published by Prisoners' Legal Services of New York

PLS REACHES SETTLEMENT WITH DOCCS IN CLASS ACTION OVER SHOCK DISABILITY DISCRIMINATION

As previously reported in Pro Se (see *Vol. 35 No. 1 January 2025*), PLS initiated a class action against DOCCS to challenge discriminatory practices in denying alternative Shock placement for persons with disabilities *Raymond v. New York State Department of Corrections and Community Supervision*, 9:20-CV-1380 (NDNY).

In the past, individuals with medical or mental health conditions which precluded their participation in Shock, were only offered an alternative program (alt-Shock) if they had a judicial Shock order (meaning their sentencing Judge had ordered Shock programming as part of their sentence). Individuals without such an order, who would have been otherwise statutorily eligible for Shock, were simply turned away. As a result of this practice, approximately 5,429 incarcerated individuals with medical or mental health disabilities were excluded from Shock between 2015 to 2020 alone.

Shortly after PLS filed suit in November 2020, DOCCS amended its Shock Directive (Directive No. 0086) such that individuals classified as OMH level 3 were no longer prevented from participating in Shock. Likewise, DOCCS issued an administrative memorandum directing that all eligible persons who would have been excluded from Shock due to a medical or mental health condition would now be offered alt-Shock regardless of whether Shock was court ordered for them or not. In response to these changes, both PLS and DOCCS filed motions for summary judgment in the ongoing class action.

This project is supported by a grant administered by the New York State Division of Criminal Justice Services (DCJS). Points of view in this document are those of the author and do not necessarily represent the official position of DCJS.

In September 2024, the Northern District Court issued a decision denying DOCCS motion for summary judgment and granting the PLS motion (again, see *Pro Se Vol. 35 No. 1 January 2025*).

In its decision and among other findings, the court held that a far less discriminatory practice was clearly available to DOCCS for individuals with mental/medical disabilities as evidenced by its past policy of offering alt-Shock to disabled individuals with court ordered Shock.

Likewise, the Court found that DOCCS policy changes after the lawsuit was filed did not render the claims moot because the changes were informal. For instance, DOCCS did not amend its Health Services Policy to reflect the change nor had DOCCS developed any new staff training or forms which would tend to show that the prior discriminatory violations would not recur. The Court thus directed both parties to confer and discuss a global settlement of the class action.

Since that decision PLS has been involved in settlement negotiations with DOCCS. These have now recently concluded, resulting in the following agreements:

- First DOCCS will formally revise Directive 0086 to provide that all individuals disqualified or removed from the Shock program for medical or mental health reasons will now be promptly offered enrollment in alt-shock. This will be the case regardless of whether the individual had a judicial Shock order or not.
- Second, a new paragraph will be added to the directive which, under the terms of the settlement order shall state the following:

“INCARCERATED INDIVIDUALS WITH DISABILITIES: Any individual with a disability who is otherwise eligible for the Shock Incarceration Program will be given equal access to the program and its benefits. Shock program participants with disabilities will be offered reasonable accommodations in order to participate in the program at Lakeview SICF, including but not limited to physical activity limitations. If an individual is found unsuitable due to disability after beginning the program at Lakeview SICF, the individual will be offered the opportunity to complete the program via an Alternative Shock Placement at an alternative site.”

These amendments effectively **memorialize** (make official) many of the policy changes DOCCS administratively put in place after PLS filed the class action and add procedural safeguards to implement the changes.

Additionally, within 30 days after changing its Shock Directive, DOCCS will also take steps to advise staff of the changes to Shock and how individuals can no longer be rendered ineligible due to a medical or mental health condition.

DOCCS must also produce a new Shock orientation video within the next year, to advise incoming incarcerated Shock participants of the changes. In particular, the video must inform individuals of the following:

- (1) the program's general requirements, specifically its military bearing and drill ceremony components;
- (2) that individuals with medical conditions causing physical limitations can be provided with reasonable accommodations to permit their participation in Shock;
- (3) the video must detail the process for requesting a reasonable accommodation; and
- (4) note that individuals found unsuitable for Shock (for medical or mental health reasons) will be offered alt-Shock.

Finally, DOCCS is also required to revise its Shock voluntary sign out form so that it includes a checkbox for an incarcerated participant to indicate whether they are asking to sign out for a medical and/or mental health reason. Critically, when an individual indicates they are signing out of the program for this reason, DOCCS guidance staff must immediately refer the individual to medical and/or mental health staff so their ability to participate can be evaluated.

Where it's determined that the individual's condition prevents them from participating in Shock on an equal basis to a non-disabled individual, even if reasonable accommodations were put in place, the individual will be disqualified from traditional Shock programming at Lakeview and offered an alt-Shock program instead.

Pursuant to the settlement order the class notice period will run from February 21, 2026, to June 23, 2026. During this time, DOCCS is required to post a notice summarizing the terms of the settlement agreement. DOCCS is also supposed to keep copy of the agreement in its facility law libraries.

PLS represented Latoya Raymond, Jan Javier and Santiago Garcia, the named plaintiffs in this class action.

Questions related to the settlement and/or with DOCCS Shock policy changes should be directed to the PLS Buffalo Office "Attn: Shock Incarceration Settlement", 14 Lafayette Square, Suite 510, Buffalo NY 14203.

CHANGES AT PLS WITH SPECIAL SPOTLIGHT ON PLS' PRE-RELEASE AND RE-ENTRY PROJECT EXPANSION

A Message from Acting Executive Director, Krin Flaherty

As Karen Murtagh announced in her last column, PLS is going through a transition in our leadership. Since 2008, PLS has grown into an organization with more service areas than I think Karen could have imagined at the beginning of her PLS career. This growth is largely attributable to Karen's ability to speak with legitimacy on prison issues but also listen to clients and stakeholders to understand where PLS can best help.

Consistent with that considered approach to change and growth, I'm happy to announce that David Bentivegna, our Buffalo office Managing Attorney, has taken on the title of Acting Deputy Director. David has over 15 years of litigation and advocacy on behalf of incarcerated New Yorkers. He's our internal go-to-person on all things jail time and sentencing, but with really any prison topic, David has a breadth of knowledge and deep understanding of the ways in which PLS can most effectively address the harms of incarceration. Also, he's taken on Pro Se, so this is his first complete issue!

I also wanted to announce that coinciding with March as National Social Worker Month, PLS expanded its Pre-Release and Re-Entry Pilot Project (PREP) re-entry program to serve people returning to Albany and its surrounding counties.

In 2020, PREP started as a small pilot project funded by New York Community Trust and the van Ameringen Foundation focusing on re-entry to the Bronx and Manhattan. Since then, we have steadily grown the program first to all five boroughs, Orange and Dutchess counties. Two years later, PREP grew to cover re-entry in Buffalo and Western New York.

Our scope has widened too. Originally, PREP services were limited to those who were maxing out without any access to re-entry services through DOCCS. However, as PREP grew, we began to understand that many people coming out on parole or with PRS have specific needs that the prison re-entry planning is not designed to address. In response, we began to accept applications for people who would return home on community supervision.

PREP social workers provide therapeutic tools to process the re-entry transition and practical assistance in connecting people with available resources to support successful re-entry. Our successes are remarkable in demonstrating that with support, people facing significant hurdles can come out of prison and flourish. Over its nearly six years in existence, only two active participants have returned to prison.

This newest expansion gets us closer to that goal of having PREP services available in every county in New York State. We look forward to working with people coming home to Albany and learning more about the service provider partners in the region. Please contact Jill Nolan, Director of Social Work if you are someone coming home to Albany or its surrounding counties and would like to apply for our PREP program.

Lastly, we are looking for feedback on PLS from IILC members at Albion, Elmira, Marcy, Upstate, and Wende. Please write to us if you are an IILC rep at one of those facilities and would like to participate in this effort. Thank you for the letters that we have received from a few of you.

NEWS & NOTES

New York's Court of Claims Announces Pilot Attorney Referral Program for Incarcerated Claimants

Under the law, claims for damages related to torts committed by the State of New York or its employees can only be filed and litigated in the Court of Claims. Because of this fact, many of the cases before this Court arise from incidents occurring in DOCCS prisons with a significant number of the claimants being **pro se** (without an attorney). In 2022, the Court of Claims established the Equal Justice in the Courts (EJIC) Committee, which studied ways the Court could improve equal access to justice for indigent and unrepresented litigants.

In its findings, the EJIC found that the lack of representation for incarcerated or formerly incarcerated people (as well as other indigent pro se litigants) had negatively affected their cases. Indeed, it observed that many claims which would have otherwise gone to trial were instead dismissed for various and often avoidable technical deficiencies or procedural mistakes. To address this issue, the Court of Claims recently announced that it was launching a **pilot** (test) attorney referral program.

As this is a trial program it is **limited to individuals who filed their claims on or after January 1, 2023**. If you filed a claim before that date, you are unfortunately ineligible for the program. Additionally, the previously filed claims can only involve medical malpractice, medical negligence, general negligence or assault incidents that occurred at **Coxsackie, Greene or Washington Correctional Facilities**.

Since referrals are only available for claims that have already been filed, you cannot request a referral before going to Court. In other words, to use the program, you must file your case first and, if you meet the other eligibility requirements, only then can you request a referral from the Court. Applicants must also agree to a virtual trial. While there is no fee to use the program, contingency

fees may apply if you accept an assignment. The program also cannot guarantee that an attorney will be provided even if the applicant is eligible.

Incarcerated claimants can mail a request for referral form to the Court of Claims Clerk's Office, at P.O. Box 7344, Capitol Station, Albany, NY 12224. After reviewing the request and if found eligible, the Court will forward the incarcerated claimant contact information for several attorneys it randomly selects from a list of referral partners. It is then the responsibility of the claimant to contact these attorneys and request representation. Ultimately, the incarcerated claimant decides which attorney to hire and they negotiate any fees with that attorney. Once hired, the attorney will notify the Court of their representation by filing a Notice of Appearance.

PLS is not a participant agency in the Court of Claims Attorney Referral Program and further questions/applications should be directed to the Court of Claims' Clerk's Office.

For information about drafting and filing claims in the New York Court of Claims or to help you determine which court you want to decide your legal claim, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Lawsuits in the NYS Court of Claims" and/or "Court Systems in NYS: Choosing the Proper Court."

PRO SE VICTORIES!

Matter of Andre Scott v Mark Boylan, Index No. 600502/2025 (Sup Ct Erie County, January 21, 2026). Andre Scott sent a FOIL request to the Genesee County District Attorney's Office seeking "all records" they had on file for his conviction associated with his indictment number, "including raw electronic data of related email communications, with a list of records in the file by subject matter."

In response, the District Attorney's Office advised Mr. Scott it had no raw electronic data, that it was denying his request for emails and that his request for "all records" was too vague. Mr. Scott submitted a timely appeal of this FOIL denial on January 24, 2025, but received no further response. The time limit to answer his appeal expired on February 8, 2025, which started the 4-month statute of limitations running and gave Mr. Scott until June 8, 2025 to file an Article 78 in Court.

On May 21, 2025, Mr. Scott mailed an Article 78 petition challenging the constructive denial of his FOIL request. His petition was received by the Court Clerk's office on May 27, 2025. They did not file the petition at this time, but instead held it while his application for poor person relief was being decided by the Court. Several months later, after the Court granted Mr. Scott's poor person application, the Clerk's office filed his petition on September 15, 2025.

After Mr. Scott's Article 78 petition was filed, the Respondent Genesee County Attorney submitted an affidavit seeking to dismiss it. First, they argued that since the petition was not actually filed until September 15, 2025, it was untimely (late). Respondent also argued Mr.

Scott's request for "all records" was impermissibly vague under POL §89 (3)(a), which requires that requests "reasonably describe" the records they are seeking.

In his reply papers, Mr. Scott countered that his petition was timely because it had been received by the Clerk's office before the 4-month statute of limitations expired and was thus tolled while his poor person application was pending.

In its decision, the Court agreed with Mr. Scott, finding that when an incarcerated individual files a properly supported application for poor person's relief, the petition is deemed filed when it is received by the Clerk's Office. Since Mr. Scott's petition was received before June 8, 2025, his petition was timely. In addition, the Court found that Mr. Scott's request for "all records related to his indictment," while possibly over broad was not too vague. Given these findings the Court declined to dismiss the Petition.

Turning to the FOIL request itself, while the Court determined that some of the records Mr. Scott had requested (e.g. the emails and record lists) were exempt from disclosure under FOIL, it still ordered the County Attorney to provide him with copies of any remaining nonexempt records at no cost to him.

Bernard Patterson v New York, Claim No. 129354 (Court of Claims, December 19, 2025).

Bernard Patterson filed a claim seeking compensation for a radio that was damaged by DOCCS staff at Green Haven C.F. In brief, Mr. Patterson received a new radio in November 2016, but before he had an opportunity to use it, a correction officer cut its carrying strap. Mr. Patterson learned that this act voided the manufacturer's warranty and he promptly submitted an administrative claim seeking reimbursement for the cost of the radio. After some appeals, Mr. Patterson's administrative claim was approved by DOCCS and he was directed to submit the damaged radio to facility staff, so that it could be replaced. Mr. Patterson did so, but he was never provided with a new radio or otherwise reimbursed.

Thereafter, Mr. Patterson filed a claim for the radio in the State Court of Claims. The matter was resolved in a remotely conducted trial in which Mr. Patterson appeared and argued his claim pro se. After hearing arguments and considering Mr. Patterson's testimony, the Court found the State liable to Mr. Patterson for the damage and subsequent loss of his radio. The State was ordered to reimburse Mr. Patterson \$41.50 (the radio's value) plus statutory interest that had accrued from November 2016.

Pro Se Victories! features summaries of successful pro se administrative advocacy and unreported pro se litigation. In this way, we recognize the contribution of pro se jailhouse litigants. We hope that this feature will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of decisions submitted exceeds the amount of available space, the editors make the difficult decisions as to which decisions to mention. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.

For information about the NYS Freedom of Information Law and other ways to access records, as well as drafting and filing claims in the New York Court of Claims or to help you determine which court you want to decide your legal claim, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: “Access to Records,” “Lawsuits in the NYS Court of Claims” and/or “Court Systems in NYS: Choosing the Proper Court”

STATE COURT DECISIONS

Disciplinary & Administrative Segregation

Court Finds That Possession of Cell Phones Alone Does Not Constitute a “Heinous or Destructive” Act Under HALT Law

The Petitioner in *Matter of D.G. v Anthony Rodriguez*, 2026 WL 440349 (Sup Ct Albany Co 2026), challenged a Tier III disposition in which he received 365 days SHU confinement after allegedly being found in possession of multiple cell phones.

Concerning the penalty, the hearing officer solicited testimony from a corrections lieutenant on the potential dangers that a contraband cell phone could pose. Notably, most of the hearing officer’s questions were **leading** (meaning they asked for yes or no answers only). More importantly, all the questions involved hypothetical situations on how a cell phone could be used to compromise prison safety/security but not anything D.G. had specifically been alleged to have done.

D.G. tried to question the lieutenant about their lack of personal knowledge of the alleged misbehavior, but the hearing officer would not permit it. Instead, the hearing officer explained the lieutenant was only speaking as to their knowledge and expertise in corrections and that they had no information concerning the actual phones allegedly found in D.G’s cell. At the conclusion of the hearing, based on the lieutenant’s testimony, the hearing officer concluded that the possession of cell phones was a “heinous and destructive act” necessitating a confinement penalty in excess of the limits imposed by HALT.

The Court, however, strongly disagreed. Upon reviewing the hearing record, the Court found that the testimony at issue was phrased in entirely speculative terms, primarily concerning what “could” result from the possession of a cell phone but not anything specific to D.G’s alleged cell phone possession and/or how likely it was to put someone at risk of imminent serious physical

harm. Taking HALT's language and its legislative history into consideration, the Court observed that long-term segregated confinement was only intended for specific types of violent conduct, namely those that cause, or place individuals at imminent risk of, serious physical injury.

Here, the potential threats articulated in the lieutenant's testimony were too remote, with many requiring numerous intervening steps. As a result, the Court found no "competent" evidence in the record to support a finding that D.G.'s alleged misbehavior caused an imminent threat to anyone's safety. Thus, absent more specific testimony, the Court concluded that possessing cell phones is not by its nature alone, a heinous or destructive act as contemplated under HALT.

Since D.G. had already served far more confinement time than was otherwise permitted under HALT, he was ordered discharged from the SHU immediately. Moreover, upon concluding that the hearing was both fundamentally unfair and conducted with disregard to the provisions of the HALT act, the Court further ordered that the matter must be reversed and expunged from his institutional record.

D.G. represented himself in this Article 78.

Point of Practice – Because this is an Albany County Supreme Court decision, it does not have the same precedential authority as an Appellate Court decision. This means that, although you may cite to this case for its "instructive" value, other New York State Supreme Courts are not **bound** (required) to follow it. Thus, it is possible a case with similar facts could be decided differently by another Judge.

Third Department Holds That Tier III Hearing Time Limits Remain "Directory" Rather Than "Mandatory"

Petitioner in *Matter of Isiah Guerrero v Daniel F. Martuscello*, --N.Y.S.3d ---, 2026 WL 616277 (Third Dept. March 5, 2026), was allegedly involved in a violent altercation with correction officers. Following a determination that he met the standard under HALT for pre-hearing confinement, Petitioner was placed in the SHU where he remained for 14 days before a Tier III hearing was concluded. He was found guilty, received a 730-day SHU sanction and was thereafter transferred to an RRU.

In an administrative appeal, Petitioner argued that his hearing was untimely, specifically because under HALT it should have commenced and been completed within five days of his placement in the SHU. DOCCS upheld the hearing disposition (although Petitioner's penalty was reduced to 365 days SHU) and an Article 78 ensued. In October 2024 the Supreme Court dismissed the petition, finding that Petitioner had failed to preserve his timeliness claim by not raising it at the hearing. Petitioner thereafter appealed to the Appellate Division.

On appeal, Petitioner argued that the disciplinary hearing time limits articulated under HALT (see Correction Law §137 [6][I], and [7]), are mandatory such that annulment of the hearing is required if they are missed. Notably, prior to the HALT act, Courts historically viewed these time limits as merely directory - meaning they are guidelines only and strict adherence was not required. Petitioner, however, argued that the statutory overhaul enacted by HALT, in combination with its goal to limit the amount of time an incarcerated individual spends in segregated confinement, had made the time limits mandatory.

The Court disagreed, noting first that an administrative agency’s time limits are generally construed as discretionary unless the law underlying that agency’s authority expressly limits its authority to act after the time limit expires. Turning to HALT, the Court found that the language in the Correction Law does not specifically prohibit DOCCS from commencing or concluding a hearing after the five-day time limit has expired. The Court therefore concluded that disciplinary hearing time limits remain directory under HALT.

Additionally, because these limits are directory only, the Court further ruled that Petitioner was first required to raise the timeliness issue at his hearing. This is because doing so would have created a record concerning the reason for the delay and provide a reviewing authority such as the Court, with a basis for determining whether the delay was prejudicial. Here, since Petitioner did not object to the delay at his hearing his arguments on appeal were also deemed unpreserved. _____

Isiah Guerrero was represented by PLS in this Article 78. PLS is also moving for permission to appeal this matter to the Court of Appeals (New York’s highest Court). Although that Court is not required to review the Third Department’s decision further, we will post an update should there be any further developments.

Point of Practice – If you are subject to a Tier III hearing delay which you believe prejudiced your defense, then you must object to that delay at your hearing and explain to the hearing officer why the delay was harmful. If you do not do so, it is likely you will be unable to successfully raise a timeliness argument in any subsequent court challenge to the hearing.

For information about your rights at a Tier III Hearing and filing Article 78 actions, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: “Your Rights at a Tier III Hearing” and “Drafting and Filing an Article 78.”

Parole

Third Department Affirms Parole Re-Hearing Imposing a Longer Reconsideration Period than that which was Imposed at the Prior Reversed Hearing

In *Matter of Phillip Copeland v Darryl C. Towns*, 244 AD3d 1697 (Third Dept. December 31, 2025), the petitioner appeared before the Board for release consideration in November 2022. He was subsequently denied parole and given an 18-month hold before he could seek reconsideration. After an administrative appeal, in which Mr. Copeland noted that the Board had failed to explain its reason for denying his release despite a low COMPAS risk assessment, that initial determination was vacated and the matter was remitted for a **de novo** (new) hearing.

At the September 2023 rehearing, the Board again declined to release Mr. Copeland. This time though, it imposed a 24-month hold instead of reapplying the same 18-month period it had previously used. After an unsuccessful administrative appeal, Mr. Copeland filed an Article 78. His petition was dismissed by Supreme Court, but he then appealed to the Third Department, challenging in particular the longer reconsideration period, which he argued was in retaliation for his previously successful administrative appeal.

In response, the Appellate Court affirmed the Board's determination. Specifically, it found that the Board appropriately considered all the requisite statutory factors and, having done so, there was nothing facially improper about it imposing 24 months as opposed to 18. In addition, the Court observed that since the petitioner had not supplied any proof of Board retaliation, his claims remained speculative only.

In the absence of any further showing that the Board acted with "irrationality bordering on impropriety," the Court declined to reverse the rehearing.

Phillip Copeland was represented by the NYC Parole Preparation Project on his appeal.

For information about the factors considered by the Board of Parole and Judicial Review of Parole Denials, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Parole Release: Factors Considered by the Board of Parole" and "Drafting and Filing an Article 78."

Sentence & Jail Time

Two Year Gap Between Defendant's Prior Abuse and Subsequent Offense Renders Them Ineligible for Re-Sentencing Under CPL §440.47 - the Domestic Violence Survivor's Justice Act

Just prior to his 17th birthday, the defendant in *People v Devon Y.*, 250 N.Y.S.3d 737 (Third Dept March 19, 2026) participated in two violent home invasions, at least one of which involved significant physical injury to the victims. The Defendant was later arrested for these acts, tried and convicted. He was sentenced to a determinate term of 25 years to be followed by five years Post-Release Supervision.

In May 2023, Defendant moved for resentencing under the Domestic Violence Survivors Justice Act (DVSJA, see also CPL § 440.47). County Court determined the Defendant met the threshold eligibility requirements and scheduled a hearing. At the conclusion of the hearing though, County Court denied the motion, finding the Defendant had not shown a sufficient temporal link between the abuse he had suffered and his later crimes. Defendant appealed this decision to the Appellate Division, Third Department. The Third Department affirmed the denial.

In order to establish his eligibility for re-sentencing the Appellate Court observed that the Defendant had to establish three factors. First, that at the time of his offense he was a victim of domestic violence who had been subjected to substantial physical, sexual or psychological abuse. Second, that this abuse was a significant contributing factor to his criminal behavior. And third, that after considering the nature of the crime with the Defendant's history, character and condition, a reduced sentence would be warranted.

Upon reviewing the record on appeal the Appellate Court determined that the Defendant was indeed the victim of "unspeakable," acts of abuse during his childhood. This included physical as well as sexual abuse by family members and a former babysitter. However, this history of abuse ended when the Defendant was in his early teens. The instant offense was committed just before he turned 17. Since there was a two-to-four-year period of time between these events, the Court concluded there was no evidence to suggest the abuse was ongoing at the time of his crimes.

While the Court acknowledged that Defendant's early childhood was tragic, citing a string of recent cases (see *People v Williams*, 198 AD3d 466 [First Dept. October 12, 2021]) it held that even indisputable proof of past abuse is not enough to qualify for re-sentencing under the DVSJA, there must still be a sufficient "temporal nexus" (proximity in time) between the two. Thus, the Court concluded that Defendant's motion was properly denied.

Defendant was represented by the Ulster County Public Defender's Office on his appeal.

For more information about the Domestic Violence Survivors Justice Act, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memo: “Domestic Violence Survivors Justice Act: Resentencing Options.”

Jail Time Cannot Be Credited to New Felony Charges and Post-Release Supervision (PRS), Even Where the PRS Term Was Discharged Prior to Sentencing

In June of 2021, the Petitioner *In the Matter of Henry v Martuscello*, 2026 WL 848158 (Third Dept March 26, 2026), was arrested on new felony charges while he was simultaneously serving a previously imposed term of PRS. Following the arrest, he was declared delinquent on his PRS term and held locally (meaning he was confined in a County Jail, or for residents of New York City, the NYC Department of Correction) while awaiting a final parole revocation hearing.

This final hearing was postponed and ultimately did not occur by the time Petitioner reached his PRS term’s maximum expiration date on March 9, 2023. After that date, he remained held in local custody on his new charges until he was eventually convicted and sentenced in June of 2023.

When he was transferred to DOCCS to serve this new felony sentence, County officials initially certified all 755 days he had spent in local custody from June 2021 to July 2023 as Jail Time credit – to be applied toward his new sentence. However, the County Sheriff’s Office later issued an amended jail time certificate in which the Petitioner’s jail time was reduced to 125 days. The new certificate now included credit only for those dates between when his PRS term was discharged and when he was sent to DOCCS.

Petitioner thereafter filed an Article 78 petition to challenge the jail time amendment, arguing that he was instead entitled to all 755 days. The Supreme Court dismissed the petition and the Petitioner then appealed to the Appellate Division Third Department.

In considering the matter, the Court first noted that under Penal Law §70.30 (3) jail time credit cannot include any time that was also “credited against the term or maximum term of any previously imposed sentence or period of [PRS] to which the person is subject.” Consequently, since Petitioner’s previously imposed PRS term was running on the date of his arrest and continued to run until the day it was discharged on its maximum expiration date, he could not receive jail time credit for that period. This was because the time was applied to his prior PRS term and under Penal Law §70.30 (3), such periods of local confinement cannot be credited to both a parole/PRS violation and a new sentence simultaneously.

The Court therefore concluded that the jail time amendment was legally permissible and affirmed the decision below dismissing the petition.

Petitioner Levar Henry represented himself in the above Article 78.

Note – The above case presents a slightly different fact pattern to a relatively common occurrence in prison, that is the loss of Jail Time due to a certification error. In this regard DOCCS regularly reviews the Jail Time certificates of its incarcerated population in order to identify instances of "Double Dipping." These occur when a period of time that has been certified as Jail Time by a county sheriff's office was also applied towards a previously imposed term of PRS or parole by DOCCS. You should note that in such cases, DOCCS contacts the county sheriff's office (or the New York City Department of Corrections for NYC residents) and asks that they decertify any Jail Time that was also used to reduce the time owed on a prior term of parole/PRS. To date, this practice and the legal rationale underlying it has been repeatedly upheld in Court (See, *Matter of Drayton v. Schiff*, 232 AD3d 1027, [3d Dept 2024]; and *Matter of DuBois v Goord*, 271 AD2d 874 [3d Dept. 2000]).

Miscellaneous

FEDERAL COURT DECISIONS

Northern District Court Denies Motion to Dismiss in Civil Claim Over the Murder of Robert Brooks and Allows Plaintiff to File a Second Amended Complaint

In January 2025, the estate of Robert Brooks commenced a 1983 civil rights action against numerous individuals following his tragic death at Marcy C.F. *Cressida v Anthony Farina et al.*, 2026 WL 482664. These defendants fall into two broad categories.

The first group consists of the officers and staff who were present for and/or participated in the events at Marcy, collectively called the "on scene defendants."

The second group, collectively called the "supervisory defendants" were not present but had administrative authority over those staff members who were. These defendants included the Marcy Superintendent Medburry, DOCCS Deputy Commissioner for Correctional Facilities D'Amore and Commissioner Martuscello.

Since filing the initial complaint and one prior amendment, the Plaintiff estate moved to file a second amended complaint (SAC). Notably, while plaintiffs in federal claims may amend a complaint once as a matter of right under the Federal Rules of Civil Procedure, amending a second time requires either all the parties to **consent** (agree) or, if they do not, plaintiff must ask for the Court's permission to amend in a motion. As part of this motion, Plaintiff here submitted a copy of their proposed SAC to the Court.

In its SAC, the Plaintiff estate asserted three categories of claims. One is against the ‘on scene’ defendants and these allege various violations of Robert Brooks’ eighth amendment rights, primarily through the use of excessive force. The second is against the ‘supervisory defendants’ and these allege violations of Mr. Brooks’ Eighth amendment rights for the failure to protect him from a substantial risk of harm. The third and final claim is for the alleged gross negligence of a Marcy C.F. nurse.

Attorneys for supervisory defendant Commissioner Martuscello moved to dismiss arguing that the SAC failed to properly state a legal claim against defendant Commissioner Martuscello and that he should thus be removed as a party from the lawsuit.

As an initial matter, when motions to dismiss for the failure to state a claim are considered by federal courts, they are supposed to review the legal sufficiency of the plaintiff’s reasons for having requested relief against the moving defendant (see Fed. R. Civ. P. 12[b][6]). As part of this review, Courts accept as true all well-pled facts in the complaint and draw all reasonable inferences in the plaintiff’s favor (see generally, *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 [2d Cir. 2007]). This is because failure to state a claim motions are brought at the start of a case (before discovery is concluded) and their purpose is to argue that, even where the allegations in a complaint are true, there is still no basis for the lawsuit to proceed against the moving defendant.

To survive a motion to dismiss, the plaintiff must include pleadings with enough facts to show they are entitled to relief. Notably, these facts do not need to be overly detailed, but they must be enough to show the reviewing court that a plaintiff is at least plausibly entitled to relief and not merely possibly entitled to it (see *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 [2007]).

Here, in their SAC, the Plaintiff estate alleged that Robert Brooks’ death was the result of a “**de facto**” (meaning unofficial but still widely practiced) DOCCS policy in which correction officers who engage in excessive force against incarcerated individuals are not adequately disciplined or removed from duty. The SAC further alleged that this practice is beneficial to DOCCS because it maintains the appearance of order at its facilities but that in action it poses a substantial risk of harm to the incarcerated population. Finally, the SAC asserted that the supervisory defendants were aware of this ‘policy’ but did nothing to protect Mr. Brooks from being harmed under it.

The supervisory defendants argued that the SAC did not sufficiently allege that any such ‘policy’ existed and that it instead merely described various prison conditions, mischaracterizing them as a policy. The motion further asserted that the SAC failed to sufficiently establish that Commissioner Martuscello was personally involved in any deprivation of Robert Brooks’ rights and/or that he was deliberately indifferent to a serious risk of harm.

Taking up Defendant's motion, the District Court first observed that in order to sufficiently state a claim under the 8th amendment – that a defendant had failed to prevent harm – the plaintiff must first plead that the alleged conditions of confinement posed an objectively unreasonable risk of serious harm and that the defendant acted with deliberate indifference despite being aware of that risk.

Applying this standard to the SAC, the Court first considered whether the existence of an alleged 'policy,' was sufficiently pleaded and if so, whether it posed an unreasonable risk of harm to Mr. Brooks.

In this regard the SAC referenced a variety of sources in support of the existence of a de facto policy. For example, the Court noted that the SAC listed numerous citations to other 1983 claims filed against DOCCS staff which involved allegation of assault by correction officers. The SAC further referenced data on jury verdicts, settlement awards, and staff criminal prosecutions, highlighting more than a dozen individual instances of assaults that had occurred since 2020. Lastly, the SAC also discussed the findings in multiple publicly available reports (authored by organizations such as the Marshal Project, CANY and the New York Times) detailing violence in NYS prisons generally and Marcy specifically.

Taken together, the Court concluded that the SAC plausibly alleged that a 'policy' existed and that it amounted to a condition of confinement which created an objective risk of serious harm to Mr. Brooks. In so doing the Court rejected arguments from defendant's motion, which described the alleged policy as mere description of prison conditions, as a "distinction without a difference."

The Court next considered whether the SAC plausibly alleged that Commissioner Martuscello was aware of the policy but remained deliberately indifferent to it. On this issue the SAC detailed the Commissioner's career including his involvement in and knowledge of staff disciplinary proceedings, his access to OSI reports containing allegations of abuse against incarcerated individuals and finally, several quotes he provided to the publicly available reports listed above, in which he acknowledged issues of violence within State prisons.

Here again, the District Court concluded that the SAC's many factual allegations were sufficient to establish (at this initial phase of the litigation) that Defendant Commissioner Martuscello was aware of the alleged 'policy,' and sufficient to show that he was deliberately indifferent to the risk of harm it posed for incarcerated individuals like Mr. Brooks.

Moreover, the Court disagreed with Defendant's arguments asserting that the SAC failed to allege personal involvement in the events at Marcy. The Court held that his direct participation was not necessary because the SAC's claims against the supervisory defendants were for their alleged failure to protect Mr. Brooks and not that he engaged in any excessive force of his own.

Accordingly, the Court denied Defendant's motion to dismiss and granted the Plaintiff estate's motion for leave to file a second amended complaint. The case will now move on to further proceedings.

Point of Practice – Court decisions denying a motion to dismiss for the failure to state a claim, do not mean the plaintiff has ultimately prevailed in their case. Rather, they mean only that a complaint contains allegations which, when assumed to be true, are sufficient enough to demonstrate that the plaintiff is plausibly entitled to relief and as a result, that the case should proceed. It should be noted that even after losing a motion to dismiss, defendants can still challenge the veracity or truth of a plaintiff's allegations in their answers to the complaint and/or in subsequent motions for summary judgment.

For information about drafting and filing Section 1983 actions or Failure to Protect claims, write to the PLS office that provides legal services to individuals incarcerated at the prison from which you are writing and request the memos: "Section 1983 Actions Against Prison Officials in Federal Court" and/or "Failure to Protect."

IMMIGRATION MATTERS

Nicholas Phillips

Supreme Court Set to Consider Birthright Citizenship Case

Trump v. Barbara, No. 25-365, the so-called "birthright citizenship case" is pending before the Supreme Court. The case was argued on April 1, 2026, and a decision is expected by the time the Court's term ends, which is usually in June or July.

Trump v. Barbara concerns the Citizenship Clause of the Fourteenth Amendment to the United States Constitution, which provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Enacted in 1868, the Fourteenth Amendment attempted to resolve a host of legal questions stemming from the Civil War and from the Thirteenth Amendment's abolition of slavery in 1865.

By passing the Citizenship Clause, Congress intended to specifically **repudiate** (reject) the Supreme Court's notorious decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). That decision—widely considered to be the Supreme's Court worst—held that enslaved people

of African descent “are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.” *Id.* at 404.

The Citizenship Clause sought to reverse *Dred Scott*’s holding and ensure that all children born in the United States to formerly enslaved persons were United States citizens. But while the purpose of the Citizenship Clause was clear, the wording was not, and a question soon arose: did the phrase “subject to the jurisdiction thereof” apply to children born in the United States to foreign nationals?

In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court answered that question in the affirmative and held that a person born in San Francisco to Chinese parents had acquired United States citizenship at birth. In so holding, the Supreme Court concluded that the Citizenship Clause must be construed “in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.” *Id.* at 655.

Looking first to English common law, the Court found that “[t]he fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called ‘ligealty,’ ‘obedience,’ ‘faith,’ or ‘power’—of the king.” *Id.* The only exceptions to this general principle were for children born to foreign diplomats and ambassadors, born to enemy forces engaged in hostile occupation, or born on foreign public ships.

Next, the Court reviewed early American legal decisions and concluded that the English common law rule had been adopted in the United States and was not altered following the ratification of the Declaration of Independence in 1776. Since Wong Kim Ark was born in the United States and was not subject to any of these limited exceptions, he was a United States citizen.

For more than a century since *Wong Kim Ark*, the Supreme Court’s interpretation of the Citizenship Clause prevailed with little controversy. That changed on January 20, 2026, when President Trump, on his first day in office, enacted Executive Order No. 14,160, titled *Protecting the Meaning and Value of American Citizenship*.

The Executive Order provided that a person born in the United States is not a citizen if:

(1) “the person’s mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person’s birth,” or

(2) “when that person’s mother’s presence in the United States at the time of said person’s birth was lawful but temporary . . . and the father was not a United States citizen or lawful permanent resident at the time of said person’s birth.” *Id.* § 1.

The order directed the federal government not to issue citizenship documents to persons in these categories, and not to accept state or local government documents purporting to recognize citizenship for such persons. *Id.* §2. The order further specified that it would “apply only to persons who are born within the United States after 30 days from the date of this order.” *Id.* §2(b).

Unsurprisingly, the Executive Order drew immediate legal challenges from a wide array of families, states, and nonprofit organizations, and three federal district courts issued universal injunctions prohibiting it from taking effect.

The government appealed those decisions to the Supreme Court, which struck down the injunctions in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025). *Trump v. CASA, Inc.* case did not address the merits of the Executive Order, but rather concerned the procedural question of whether district courts have the power to issue universal injunctions which apply across the entire country. The *Trump v. Casa* decision held that they do not, and so the Court vacated the injunctions and returned the case to the lower courts, while leaving open the possibility that universal injunctive relief could be achieved through a class action lawsuit.

Mindful of the Court’s decision, a new group of plaintiffs filed a nationwide class-action lawsuit challenging the Executive Order, and on July 10, 2025, the New Hampshire federal district court issued a decision granting provisional class certification and ordering a class-wide preliminary injunction barring the order from taking effect. *See Barbara v. Trump*, 790 F. Supp. 3d 80 (D.N.H.). The government again appealed to the Supreme Court, which granted certiorari on the question of whether the Executive Order is legal.

With the Supreme Court now poised to consider the merits of President Trump’s interpretation of the Citizenship Clause, both sides have sharpened their arguments for and against the legality of the Executive Order.

In its briefing, the government has focused on the concept of “domicile,” a word which appears repeatedly in the *Wong Kim Ark* decision, for example when the Court notes that Wong Kim Ark’s parents had “a permanent domicile and residence in the United States.”

In the government’s view, the *Wong Kim Ark* Court’s reference to domicile was critical to the Court’s decision, and proves that citizenship should only be bestowed to the children of foreign nationals who have established domicile—that is, persons who have “lawful,

permanent residence within a nation, with intent to remain.” *Trump v. Barbara*, No. 25-365, Petition for a Writ of Certiorari Before Judgment (Sept. 26, 2025) at 16–17.

In response, the challengers—called the “respondents” before the Supreme Court—primarily defend the traditional understanding of *Wong Kim Ark*, but they also raise a statutory argument based on 8 U.S.C. §1401(a). That statute was passed by Congress in 1940 and re-enacted in 1952, and it mirrors the Citizenship Clause to provide that “a person born in the United States, and subject to the jurisdiction thereof” is a United States citizen.

In the respondents’ view, when Congress enacted this statute, it incorporated the common understanding of the Citizenship Clause at the time of the statute’s enactment. Under that common understanding, all children of foreign nationals born in the United States (subject to the limited exceptions noted by *Wong Kim Ark*) acquired citizenship at birth. Since the Executive Order violates the common understanding of the Citizenship Clause codified by 8 U.S.C. §1401(a), the respondents argue, the Court can simply strike down the Executive Order as violating the statute without reaching the constitutional question of whether it also violates the Citizenship Clause.

With the case fully briefed and argued, it is now up to the Supreme Court to determine whether President Trump’s attempts to refashion the Citizenship Clause will be successful.

NOTICES

PREP

PREP provides counseling and re-entry planning guidance for individuals who are within 6-18 months of their release date and returning to one of the five (5) boroughs of New York City or one of the following counties: Albany, Columbia, Dutchess, Erie, Genesee, Greene, Monroe, Montgomery, Niagara, Orange, Orleans, Putnam, Rensselaer, Rockland, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Westchester or Wyoming. Individuals serving their maximum sentence should automatically receive an application by legal mail. Individuals who will be on parole are eligible only if they have served at least one prior prison sentence. Individuals convicted of sexual crimes and those on the sex offender registry are ineligible. Write to 10 Little Britain Road, Suite 204, Newburgh, NY 12550.

Your Right to an Education



Your Right to an Education

For questions about access to GED support, academic or vocational programs, or if you have a learning disability, please write to: Maria E. Pagano – Education Unit, 14 Lafayette Square, Suite 510, Buffalo, New York 14203.

The Family Matters Unit

The Family Matters Unit of Prisoners’ Legal Services of New York is a specialized unit that assists incarcerated parents with certain family law matters. The FMU assists parents whose county of conviction is *Albany, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Onondaga, Orange, Queens, Richmond, or Suffolk*, or who have children currently living in one of those counties.

Family Matters Unit attorneys work with eligible incarcerated parents to prepare child visitation petitions, prepare child support modification petitions, access family court records, challenge denials of proximity to minor child transfer requests, and challenge prison disciplinary proceedings that result in interference with visitation or communication with minor children.

The goal of the Family Matters Unit is to be a resource for incarcerated parents, and help maintain family ties during the parents’ incarceration. For parents who are subject to child support orders, the Family Matters Unit also helps to address one of the major barriers to successful reintegration – the accumulation of insurmountable debt because of child support arrears.

If you would like the assistance of the Family Matters Unit and you meet the eligibility requirements described above, please write to the Family Matters Unit at: Prisoners’ Legal Services of New York, Family Matters Unit, 50 Beaver Street, 5th Floor, Albany, NY 12207.

CALL FOR SUBMISSIONS

HELP PRISONERS' LEGAL SERVICES CELEBRATE NATIONAL PRO BONO WEEK

National Pro Bono Week (October 25 – 31) is a time to celebrate and recognize the dedicated work of *pro bono* volunteers, as well as to educate the community about the many legal and other issues faced by people incarcerated in New York State prisons. PLS is happy to announce that this year we will again be celebrating National Pro Bono Week with an event highlighting our commitment to serving the incarcerated community.

This will be our 15th year celebrating National Pro Bono Week, and we will also be celebrating the 50th anniversary of PLS. In connection to these two momentous occasions, we are excited to announce we will be compiling a zine featuring artwork, poetry, and short stories created exclusively by people currently and formerly incarcerated New Yorkers. A zine is a self-published magazine centering around one subject matter and containing works created by a collective of individuals.

Inspired by 50 years of PLS, we are seeking artwork, poetry, and short story submissions that focus on the importance of legal representation for incarcerated people. Submissions can focus on, but do not have to be limited to, the following:

- *Why is civil legal representation for incarcerated people important?*
- *How has legal representation, or lack thereof, personally affected you during your incarceration?*
- *How has your experience with legal representation shaped you as a person?*
- *What do you hope to see from PLS in the future?*

This year, we are encouraging individuals to express themselves in the way they feel most comfortable, whether visually or in writing. Our goal is to give every incarcerated New Yorker a chance to contribute, express themselves, and have their voices heard. We are seeking writing and artwork from individuals with all levels of experience.

For art submissions, we are aware not everyone who is incarcerated has access to art supplies, and will be accepting submissions of all shapes and sizes, whether made with pen, pencil, or

specialized art supplies. For written submissions, if you write in a language other than English, please feel free to send us a submission in your primary language, that is, the language in which you are most comfortable expressing yourself. **Please limit written submissions to two pages in length.**

We will compile selected submissions into a zine, with the goal of distributing the zine in communities local to PLS offices, as well as within DOCCS. Additionally, some submissions will be displayed at our National Pro Bono Week celebration. Please note, submissions must be appropriate for all ages.

By sharing the artwork and written submissions of incarcerated people, we hope to educate the public, highlight the importance of access to legal representation for individuals in prison, and recruit attorneys to take cases *pro bono*, thus increasing access to justice for indigent incarcerated individuals across New York State. While we cannot guarantee that submissions will be included in our zine, we encourage all submissions and will do our best to integrate as many submissions as possible. PLS reserves the right to make editorial changes to submissions.

Submissions should be mailed to: Pro Bono Director, Prisoners' Legal Services of New York, 50 Beaver Street, 5th Floor, Albany, New York 12207, **no later than June 30, 2026.**

We regret we will not be able to return any submissions mailed to us, whether selected or not, due to the volume of submissions expected, as well as DOCCS mail policies.

Please note that contributing your submission for the pro bono event described above is not the same as seeking legal assistance or representation from PLS. If you are seeking legal assistance, you must write to the appropriate PLS office.

With your submission, please indicate yes or no for the following:

- I authorize PLS to publish my submission in their 2026 pro bono zine.
- I authorize PLS to display my submission at their 2026 pro bono event.
- PLS may use my real name in relation to my submission.
- I authorize PLS to use my submission on their website, in *Pro Se*, and/or for other informational purposes.
- My submission can be used again by PLS after the 2026 pro bono event.

**Pro Se
114 Prospect Street
Ithaca, NY 14850**

PLS OFFICES

Requests for assistance should be sent to the PLS office that provides legal assistance to the incarcerated individuals at the prison where you are in custody. Below is a list of PLS Offices and the prisons from which each office accepts requests for assistance.

PLS ALBANY OFFICE: 50 Beaver Street, 5th Floor, Albany, NY 12207

Adirondack • Altona • Bare Hill • Clinton • CNYPC • Coxsackie • Eastern • Edgecombe • Franklin • Gouverneur • Greene • Hale Creek • Hudson • Marcy • Mid-State • Mohawk • Otisville • Queensboro • Riverview • Shawangunk • Ulster • Upstate • Wallkill • Walsh • Washington • Woodbourne

PLS BUFFALO OFFICE: 14 Lafayette Square, Suite 510, Buffalo, NY 14203

Albion • Attica • Collins • Groveland • Lakeview • Orleans • Wende • Wyoming

PLS ITHACA OFFICE: 114 Prospect Street, Ithaca, NY 14850

Auburn • Cape Vincent • Cayuga • Elmira • Five Points

PLS NEWBURGH OFFICE: 10 Little Britain Road, Suite 204, Newburgh, NY 12550

Bedford Hills • Fishkill • Green Haven • Sing Sing • Taconic

Pro Se Staff

EDITOR: DAVID BENTIVEGNA, ESQ.

CO-EDITOR: KRIN FLAHERTY, ESQ.

WRITERS: NICHOLAS PHILLIPS, ESQ.

COPY EDITING AND PRODUCTION: ALETA ALBERT